of the court, and the weight of this argument vanishes on the realization that the section must always leave the question as one of personal judgment for the trial judge. That fact being kept in mind, it can hardly be disputed that in almost any case where an instrument would, in the opinion of a trial judge, appear from its face to have been altered after signature, it might just as easily, to a judge slightly more inclined to distrust his fellow-man, appear to have been altered after delivery.

L. A. C.

EVIDENCE: CRIMINAL LAW: ADMISSIBILITY OF DEFENDANT'S PROPERTY WHEN UNLAWFULLY SEIZED: EFFECT OF APPLICATION FOR RETURN PRIOR TO TRIAL—It has been a favorite dictum of text-writers on the law of evidence[1] that illegality in the procurement of evidence against a defendant on trial for crime cannot be made the subject of court inquiry during the trial; such illegality furnishes no ground, of itself, for the exclusion of the evidence when presented, if there is no other valid objection to its admission.. It is said that the court does not condone the illegality, but simply refuses to interrupt the orderly progress of the trial to determine a collateral issue as to the unlawful means whereby the evidence, admittedly pertinent to the charge, was procured. Thus, property which has been unlawfully seized may be made the evidentiary agency whereby its owner is convicted of crime.

Over-zealous prosecutors in California who rely too implicitly upon this dictum, seeing therein the avenue to easy convictions, with little labor and slight risk of failure, will do well to take note of the principle announced in the case of *People v. Mayen*.[2] In this case, papers and other property of the defendant, which had been seized under authority of a search-warrant admittedly void, were presented to the trial court and admitted as evidence, despite an application made by the defendant prior to his trial for the return of this property, on the ground that it had been unlawfully seized

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seems unnecessary. The modern tendency is to raise no presumption as to the time of alteration, but to admit the instrument and let the question go to the jury on all the evidence. 4 Wigmore on Evidence § 2525; Note 86 Am. St. Rep. 129, and cases there cited. For a good statement of this view see the leading case of Cole v. Hills (1862) 44 N. H. 227; see also 2 Elliott on Evidence § 1505; Hughes on Evidence, p. 212 and following; 1 R. C. L. 1041; note 39 L. R. A. (N. S.) 103, 112. This note cites California cases as establishing the rule that where an alteration is apparent on the face of an instrument it will be presumed to have been made after execution. This is an incorrect statement of California law, as the presumption against the instrument is raised only where the alteration appears to have been made subsequent to execution, i. e., where it appears suspicious. See also I Encyc. of Evidence, 813, where the same error is made, "California—An express statute requires an explanation of an apparent alteration by the party producing the paper." Citing Corcoran v. Doll, Miller v. Luco, Roberts v. Unger, all supra, n. 12.

[1] Particularly 4 Wigmore on Evidence, § 2183, §2264, and opinions there cited; 9 Illinois Law Review, 43, 1 Greenleaf on Evidence, § 254.

[2] (June 16, 1921) 35 Cal. App. Dec. 442; on petition for rehearing: (July 15, 1921) 35 Cal. App. Dec. 660. Hearing in Supreme Court granted, Aug. 15, 1921.

and taken from his home. The appellate court, in its first opinion[3] reversing the conviction, and in its subsequent opinion[4] denying a rehearing, laid down the definite rule that evidence so obtained was properly inadmissible at the trial, particularly in view of the defendant's seasonable application for its return.[5]

The decision in the principal case really adopts a rule which has lately been approved again by the United States Supreme Court. In a case[6] now forty years old, the Supreme Court laid the foundation for certain recent notable decisions,[7] wherein the earlier rule was re-affirmed and its application widened. Now, within the last year, the decision has been rendered in Gouled v. United States,[8] quoted by the court in the principal case as the authority directly in point upon the essential question involved. In the Gouled case, the evidence which the defendant applied to have returned was not known to him to be in the prosecutor's hands until it was offered during the course of the trial. The defendant then interposed objection, and made a motion to have it returned, as having been unlawfully seized. The Supreme Court held that the denial of this motion by the trial court was error.

The courts of California have never before been called upon to decide directly the precise point involved in the principal case. There are, however, dicta in certain cases[9] which indicate a tendency to follow generally the text-book rule quoted. Their effect today as binding precedents upon our state courts, in view of the direct decisions to the contrary by the United States Supreme Court, must be at least questionable. Moreover, it is clear that Federal decisions upon this point are entitled to great weight in the state courts, for the constitutional right involved, whether the case be in the national or the local courts, is dependent upon sections whose phraseology and construction are practically identical, in both the national and the state constitutions. In the Fourth[10] and Fifth[11]

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[3] 35 Cal. App. Dec. 442.

[4] 35 Cal. App. Dec. 660.

[5] The fact that application was made prior to trial would seem to be a sufficient means of distinguishing the principal case from those cases upon which Wigmore's rule (See n. 1, supra) is based: e. g., Adams v. New York (1904) 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372; People v. Le Doux (1909) 155 Cal. 535, 102 Pac. 517. Although the distinction is necessarily shown in the opinion, the reasoning of the court proceeds to the final conclusion along the broader lines taken up in the body of this discussion.

[6] Boyd v. U. S. (1886) 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524.

[7] Weeks v. U. S. (1914) 232 U. S. 383, 58 L. Ed. 652, 34 Sup. Ct. Rep. 341; Silverthorne Co. v. U. S. (1920) 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182, commented on in 8 California Law Review, 347.

[8] (1921) 255 U. S.——, 65 L. Ed. 311, 41 Sup. Ct. Rep. 261. The rule of this case was affirmed in a second opinion rendered the same day, in Amos v. U. S. (1921) 255 U. S.——, 65 L. Ed. 316, 41 Sup. Ct. Rep. 266.

[9] People v. Alden (1896) 113 Cal. 264, 45 Pac. 327; People v. Le Doux (1909) 155 Cal. 535, 546, 102 Pac. 517.

[10] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

[11] "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Amendments are to be found the protection against unlawful encroachment upon private rights by Federal officers; the constitution of California duplicates this protection, in the guarantees[12] it gives against wanton interference by officers of the state.

Prosecuting officers, deploring the handicap raised against them by this decision, argue against it that evidence is, after all, nothing more than the court's means of finding the truth; therefore, all means of finding the truth should be permitted, having due regard for the present exclusionary rules based on policy. To exclude, then, evidence such as was the subject of controversy in the principal case, is, so it is said, to turn backward the trend of development of modern legal thought, and to revert to the days when the trial of a case in court was a "game"; when the seeking of the actual truth and the dispensing of real justice were subordinated to the profitless observance of the antiquated rules under which the legal game was played by the attorneys and the court. It is urged that another exclusionary rule such as this is simply a useless addition to the outworn rules of privilege which already hamper too much the logical discovery of the truth during trial.[13]

The true foundation for the court's decision, and for the rule which it states, is to be found in that basic conception of Anglo-Saxon liberty which has given birth to the present-day privilege against self-incrimination. The doctrine of the Mayen case is no more than a logical extension of this privilege; but it has further sound basis in the closely related idea of the inherent security of the citizen in his home. Total exclusion of incriminating evidence obtained by unlawful seizure is the really effective means of discouraging such unauthorized raids and of preventing the creation of a governmental system of espionage. The remedy sometimes suggested, a civil action for trespass after he has been tried and acquitted, would be but a mocking recompense to the innocent man who had been dragged through a trial and had been forced by a prosecutor's intemperate zeal, to battle against this species of forced self-incrimination.

The Gouled case, the authority upon which the principal decision is based, has been subjected to strict limitation. In a decision

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[12] Art. I, 13, Constitution of California: "No person shall . . . be compelled, in any criminal case, to be a witness against himself . . ."

Art. I, 19, Constitution of California: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." 19 repeats verbatim the Fourth Amendment to the national Constitution.

[13] When a man is lawfully arrested by a police officer, it is well settled that he may be subjected to personal search at once (Cal. Penal Code, § 1542). Incriminating evidence found at this time may be used against him on trial. (People v. Winthrop (1897) 118 Cal. 85, 91, 50 Pac. 390; State v. Brown (1914) 83 Wash. 100, 145 Pac. 69.) Those who oppose the doctrine of the court in the principal case suggest that it would be no unreasonable extension of this practice to allow a search of the arrested man's home at the same time, on the authority of his lawful arrest; and to admit against him any incriminating evidence then discovered.

three months later,[14] despite the vigorous dissent of two justices,[15] the Supreme Court limited the application of the rule of the Gouled case to a state of facts where the government prosecutor or his actual agent committed the unlawful seizure. In this second case, the evidentiary papers for whose return the defendant applied had been stolen from him by a third party, and were later turned over by this party to the Federal attorney, for use in the prosecution of the defendant. The application for return of the papers was denied; and the inference from the Supreme Court's affirmance of this action is, of course, that admission of this evidence would violate no privilege of the defendant. This decision effectively limits the general scope of the Gouled decision,[16] but does not render it any the less applicable to the facts of the principal case.[17]

The principal case may be distinguished from the last preceding California authority[18] relative to the question involved, in the same way that the Gouled case is distinguished from the Burdeau decision. If the rule of the principal case be applied only to a

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[14] Burdeau v. McDowell (1921) 65 L. Ed. 683, 41 Sup. Ct. Rep. 574.

[15] Justices Holmes and Brandeis. The dissenting opinion suggests that the inference drawn from the majority opinion will tend practically to nullify the entire effect of the decision in the Gouled case, and of the line of decisions which it follows.

[16] Apparently the principle of the Gouled decision is to be limited, in application, strictly to those cases in which the incriminating evidence has been unlawfully seized by the government prosecutor himself, or by Federal operatives under his orders. Suppose, then:

(1) An unlawful raid by local police, or by state authorities, acting under local statutes, though perhaps with the connivance of the Federal prosecutor. (U. S. v. O'Dowd (1921) 273 Fed. 600; Dukes v. U. S. (1921) 275 Fed. 142; U. S. v. Viess (1921) 273 Fed. 279.)

(2) A theft or seizure by a private party, seeking perhaps to obtain vicarious revenge through the prosecution and conviction of the defendant, by means of the material furnished to the prosecutor. (Burdeau v. McDowell, supra, n. 12.)

(3) A seizure by private detectives, acting at the instigation, perhaps, of the government prosecutor, but without official sanction.

In these cases, although the constitutional right would unquestionably be violated, the incriminating evidence could and would be admitted; it would not apparently be barred by the rule of the Gouled decision. Note the various suggestions on this subject in 34 Harvard Law Review, 361.

[17] Even in the short time that has passed since the Gouled decision was rendered, it has been quoted as authority with comparative frequency. As might be expected, nearly all of the cases where it has been invoked to aid the defendant have been "Volstead" prosecutions, Federal cases: U. S. v. O'Dowd, supra, n. 14, in which the return of the evidence was denied, on authority of Burdeau v. McDowell; Holmes v. U. S. (1921) 275 Fed. 49, where liquor had been seized by Federal agents; Dukes v. U. S., supra, n. 14, where liquor was seized by local officers, held, that the liquor was erroneously admitted as evidence, in view of the unlawful seizure; Connelly v. U. S. (1921) 275 Fed. 509, where liquor was seized by Federal prohibition agents, acting without a search-warrant.

In state courts: People v. De La Mater (1921) 182 N. W. 57 (Mich.); People v. Mayhew (1921) 182 N. W. 676 (Mich.); State v. 16th District Court (1921) 198 Pac. 362 (Mont.); Banks v. Commonwealth (1921) 227 S. W. 455 (Ky.). *Contra*: Thielepape v. State (1921) 231 S. W. 769 (Tex.).

[18] People v. Le Doux, supra, n. 8.

state of facts like that out of which it has arisen, it will not be brought into conflict with the prior authority. However, it may be added that that authority, being only dictum, is of little persuasive power compared to the vigorously argued principles presented in the opinions in the principal case.

A. B. M.

EQUITY: MANDATORY INJUNCTION FOR REMOVAL OF ENCROACHMENTS ON LAND: CODE PLEADING: RES ADJUDICATA—A state of facts often occurs where the defendant has erected a structure which encroaches on the plaintiff's land. The plaintiff then has three possible legal remedies.[1] 1. He may remove the encroachment and sue the defendant for expenses incurred. The objection to this is that the plaintiff himself is required to advance the necessary money. 2. He may seek damages in successive trespass actions. The objection to this is that it will give rise to a multiplicity of suits. 3. He may sue in ejectment. The objection to this is that the sheriff may be unable to carry out the decree ordering the defendant to vacate and restore possession to the plaintiff.[2] When the foregoing legal remedies are shown to be inadequate, the weight of authority is that equity will grant a mandatory injunction, directly placing the obligation to remove on the one who caused the encroaching structure.[3] But the case of *Rothaermel v. Amerige*[4] clearly brings out a distinct qualification of the above rule to the effect that equity will not grant a mandatory injunction where the owner seeking the removal of the offending object has suffered no substantial injury and the injunction will impose a heavy burden on a defendant who has acted in good faith. While this qualification seems to be generally

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[1] 5 Pomeroy, Equity Jurisprudence (4th ed.) p. 4359 et seq., § 1921.

[2] Hahl v. Sugo (1901) 169 N. Y. 109, 62 N. E. 135, 61 L. R. A. 226, 88 Am. St. Rep. 539.

[3] Supra, n. 1; High, Law of Injunctions (4th ed.), p. 679, § 708; Herrman v. Hartwood Holding Co. (1920) 193 App. Div. 115 (N. Y.), 183 N. Y. Supp. 402 (wall); Hirschberg v. Flusser (1917) 87 N. J. Eq. 588, 101 Atl. 191 (foundation wall); Tice v. Shangle (1917) 182 Iowa 601, 164 N. W. 246; Kershishian v. Johnson (1911) 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402 (foundation wall); Baugh v. Bergdoll (1910) 227 Pa. St. 420, 76 Atl. 207 (wall); Smoot v. Heyl (1910) 34 App. D. C. 480 (bay window); Long v. Ragan (1902) 94 Md. 462, 51 Atl. 181 (house); Hahl v. Sugo (1901) 169 N. Y. 109, 114, 62 N. E. 135, 61 L. R. A. 226, 88 Am. St. Rep. 539 (dictum on wall); Mulrein v. Weisbecker (1899) 37 App. Div. (N. Y.) 545, 56 N. Y. S. 240 (wall); Harrington v. McCarthy (1897) 169 Mass. 492, 48 N. E. 278 (overhanging eaves); Ryan v. Schwartz (1896) 94 Wis. 403, 69 N. W. 178 (house); Pile v. Pedrick (1895) 167 Pa. St. 296, 31 Atl. 646, 46 Am. St. Rep. 677 (foundation wall); Proprietors of Maine Wharf v. Proprietors of Customhouse Wharf (1892) 85 Me. 175, 27 Atl. 93 (wharf); Baron v. Korn (1891) 127 N. Y. 224, 27 N. E. 804 (foundation wall); Wheelock v. Noonan (1888) 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405 (stones); Creely v. Bay State Brick Co. (1870) 103 Mass. 514 (causeway).

[4] (November 21, 1921) 36 Cal. App. Dec. 749 (petition for rehearing denied, January 19, 1922).